STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ANDREW WEINER,

Defendant-Appellant.

UNPUBLISHED
March 11, 2003

No. 234630
Oakland Circuit Court
LC No. 00-172762-FH

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of breaking and entering a building with the intent to commit larceny, MCL 750.110. The trial court, applying a second-offense habitual offender enhancement under MCL 769.10, sentenced him to one to fifteen years' imprisonment. We affirm.

Defendant's conviction arose from his breaking and entering of a Big Boy restaurant in Troy. He had previously been employed by the restaurant in a managerial capacity. Another restaurant employee identified defendant as the perpetrator of the break-in after viewing a surveillance tape of the incident. Defendant denied breaking into the restaurant and offered his mother and girlfriend as alibi witnesses.

Defendant argues that the trial court improperly admitted evidence of other bad acts under MRE 404(b). We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id.*

Before trial, the prosecutor filed a "notice of intent to introduce extrinsic acts evidence." Specifically, the prosecutor sought to introduce evidence at trial that approximately a week after the breaking and entering at issue in the instant case, defendant parked a block away from a different Big Boy restaurant (in Royal Oak), walked to the restaurant, and peered through the windows during the early morning hours. The prosecutor stated that the evidence would be offered to "prove a scheme, plan or system, as well as the Defendant's identity, in the burglary at issue in this case." In a supporting brief, the prosecutor also alleged that the evidence would demonstrate defendant's modus operandi. The trial court ruled that the evidence was indeed admissible, stating, *inter alia*, that "the similarities established defendant's modus operandi,"

"the similarities tend to prove the defendant's identity," and "the probative value of this evidence outweighs the danger of unfair prejudice, in view of the fact that the subsequent visit to the Royal Oak Big Boy is not a crime but merely a subsequent act."

Under MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be used to prove something other than the defendant's propensity to commit a particular crime. MRE 404(b)(1); *Watson, supra* at 576. Some permissible uses are "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." MRE 404(b)(1). In *Watson*, this Court summarized the factors a court must consider when analyzing evidence under MRE 404(b):

> First, the prosecutor must offer the other acts evidence for a permissible purpose, i.e., to show something other than the defendant's propensity to commit the charged crime. [*People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).] Second, the evidence must be relevant to an issue or fact of consequence at trial. *Id*. Third, the trial court must determine whether the evidence is inadmissible under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra* at 74-75. Additionally, the trial court, on request, may instruct the jury on the limited use of the evidence. *Id*. at 75. [*Watson, supra* at 577.]

The trial court's decision to admit the evidence in question did not violate the rules established by the above authorities. First, we conclude that defendant's legal and permissible act of walking to the Royal Oak Big Boy restaurant and peering in the window was not an "act" falling within the purview of MRE 404(b)(1). See, generally, *VanderVliet*, *supra* at 82-83.[1] Secondly, even if the subsequent event fell within the definition of "act" in MRE 404(b)(1), no error occurred because (1) the evidence was relevant to demonstrate a common plan of burglarizing Big Boy restaurants[2] and (2) the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, given the fairly limited scope of the "other-act" evidence.[3] We cannot conclude that the trial court abused its discretion in admitting the evidence.

Moreover, under *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), an evidentiary error is not a basis for reversal unless "it is more probable than not that the error was

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[1] We note that the prosecutor was not trying to prove that defendant merely peered into the window of the Troy Big Boy restaurant and that the incident at the Royal Oak restaurant demonstrated his propensity for doing so.

[2] Indeed, the alleged "casing" of the Royal Oak Big Boy restaurant permitted an inference that defendant had a plan or scheme to burglarize more than one Big Boy restaurant.

[3] In other words, defendant merely looked into the window of the Royal Oak restaurant but did not break into the restaurant.

outcome determinative." Given the strong evidence supporting defendant's guilt in this case, we simply cannot conclude that the evidence at issue likely affected the outcome of the case. Accordingly, even if the trial court *had* erred in admitting the evidence, reversal would not be warranted.

Next, defendant contends that an error requiring reversal occurred when the prosecutor asked defendant on cross-examination about his conversations with the police and with the magistrate concerning his alleged alibi. Defendant specifically objects to the following colloquies:

> *Q.* Now, as far as being so flabbergasted by your arrest and your apparent concern over being charged with other crimes, did you tell the police that you were at home asleep with your girlfriend?
>
> *A.* I did not know what day they were talking about.
>
> *Q.* Did you call your girlfriend on the phone and say, get down here and get me off the hook, let them know what's going on here, you can help me out?
>
> *A.* No, I said get down here and get me out of here.
>
> *Q.* Yes. Bail you out of jail; right?
>
> *A.* Yeah.
>
> *Q.* Not come down here and tell these detectives what's going on?
>
> *A.* My concern was to get out of jail.
>
> *Q.* And that's your concern here today, isn't it?
>
> * * *
>
> *Q.* And likewise, you were arraigned by a magistrate the next day; right?
>
> *A.* Yes.
>
> *Q.* And the magistrate said here's the charge against you, here's what you're being accused of on such and such a date; right?
>
> *A.* Yeah.
>
> *Q.* And at that point in time, your girlfriend was present there?
>
> *A.* Yes.
>
> *Q.* Did you turn around to your girlfriend at that time and say, go talk to Sergeant Avery, Detective Tullock and clear this up?

A. No.

Q. And likewise, was your mother in court at that point in time?

A. No.

Q. Did you ever tell your mother, after being advised by the magistrate what you are being charged of and the date in question, to come down and talk to Detective Tullock or Sergeant Avery?

A. At that time, I did not receive the date in question.

Defendant did not object to the prosecutor's questions at trial. Accordingly, our review is limited to a plain error analysis, and defendant must demonstrate the existence of a clear or obvious error in order to obtain appellate relief. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

No clear or obvious error occurred with respect to the questions concerning defendant's efforts to bring forth his alibi witnesses. Indeed, because defendant testified at trial, the prosecutor was free to imply that defendant's alibi evidence was not credible because he did not make a greater effort to produce the alibi witnesses earlier. See, generally, *People v Fields,* 450 Mich 94, 109-110, 117; 538 NW2d 356 (1995). While *Fields* involved not an alibi witness but rather the supposed true perpetrator of the crime at issue in that case, we find it analogous to the present situation. See also *People v Phillips,* 217 Mich App 489, 492-496; 552 NW2d 487 (1996) (concerning the ability of the prosecutor to cross-examine alibi witnesses about failing to contact the police or the prosecutor before trial).

With respect to the question concerning defendant's failure to mention his alibi to the police, we again find no clear or obvious error. First, defendant admitted at trial that he had not been given *Miranda*[4] warnings at the time in question. The United States Supreme Court has held "that when a defendant takes the stand and testifies the privilege against self-incrimination is waived and the defendant may be impeached with both prearrest silence and postarrest pre-*Miranda* silence without violating the Fifth Amendment. See *People v Sutton (After Remand),* 436 Mich 575, 592 (Boyle, J.); 464 NW2d 276, amended 437 Mich 1208 (1990).

Moreover, even when *Miranda* warnings *have* been given, impeachment with silence is permissible in certain circumstances. As stated in *People v Sholl,* 453 Mich 730, 737; 556 NW2d 851 (1996), quoting *People v McReavy,* 436 Mich 197, 218-219; 462 NW2d 1 (1990):

> "In situations where a defendant voluntarily waives his Fifth Amendment right to be silent, makes some statements, and then fails to respond to other questions, the focus of the inquiry is whether the defendant is now manifesting either a total or selective revocation of his earlier waiver of Fifth Amendment rights and whether

[4] *Miranda v Arizona,* 384 US 436 ; 86 S Ct 1602 ; 16 L Ed 2d 694 (1966).

> that revocation is induced by the implicit assurances contained in the *Miranda* warnings. If it is concluded that a defendant's lack of response constituted invocation of the right to remain silent which was induced by the government, the failure to respond would again present the "insoluble" ambiguity that *Doyle* [*v Ohio*, 426 US 610; 96 S Ct 2240; 49 L ED 2d 91 (1976)] forbids. While we have no occasion here to state what conduct short of a formal exercise of the Fifth Amendment right to remain silent or a request for counsel would constitute an invocation, wherever that line is eventually to be drawn, it is not on the facts of this case."

The *Sholl* Court went on to state that if a defendant "places limits on his willingness to speak with the police," then commenting at trial on the defendant's lack of candor during interrogation might be prohibited.

Here, defendant admitted that he may have asked the police at the time whether he was going to be charged with any other break-ins.[5] Accordingly, he demonstrated at least some willingness to speak to the police, and we simply cannot conclude from the present record that he placed a limitation on that willingness.

In light of the lack of *Miranda* warnings and the lack of evidence that defendant placed limitations on his willingness to speak with the police, defendant has simply not met his burden of establishing a clear or obvious error, and reversal is therefore unwarranted. *Carines, supra* at 763.

Finally, defendant argues that his trial attorney rendered ineffective assistance of counsel in two specific respects. Defendant first contends that his attorney erred by failing to serve the prosecutor before trial with a proposed photographic exhibit, which the court excluded from evidence because of defense counsel's discovery order violation.

To establish ineffective assistance of counsel, a defendant must show (1) that the performance of counsel "was below an objective standard of reasonableness under prevailing professional norms" and (2) a reasonable probability that, in the absence of counsel's error or errors, the outcome of the proceedings would have differed. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). This Court presumes effective assistance of counsel, and a defendant bears a heavy burden to overcome this presumption. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Moreover, because defendant

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[5] The colloquy was as follows:

> *Q.* Did you not state, though, am I going to be charged in any other break-ins? Did you make that question, did you state that question?
>
> *A.* I'm not going to say I did.
>
> *Q.* Are you going to deny that you did?
>
> *A.* No.

did not raise the issue of ineffective assistance in a motion for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

The photograph at issue depicted defendant's brother, and defense counsel stated at trial that he wanted "to establish that there is a direct similarity in the appearance between [defendant] and his brother and they both worked at the restaurant at the same time." Evidently, defendant wanted to imply that his brother committed the crime in question and that the restaurant employee who identified defendant as the perpetrator was mistaken.

Defendant has not met his burden of establishing ineffective assistance of counsel with respect to the discovery order violation for two reasons. First, defense counsel stated at trial that he had only received the photograph in question the day prior. There is simply no indication on the record that the failure of defense counsel to comply with the discovery order resulted from his own negligence and not from the negligence of defendant (or the owner of the photograph) in supplying him with the photograph. Second, we cannot conclude that the admission of the photograph likely would have affected the outcome of the trial, given that (1) the restaurant employee who identified defendant on the surveillance tape knew both defendant and his brother and testified that she could "absolutely" distinguish between the two of them and (2) the brother testified at trial and denied breaking into the restaurant.

Defendant additionally contends that his attorney erred by failing to object to the prosecutor's question "did you tell the police that you were at home asleep with your girlfriend?" As discussed earlier, the record does not support a finding that the prosecutor erred in asking this question. Accordingly, defendant has not met his burden of establishing ineffective assistance of counsel. *Sabin, supra* at 659. Moreover, in light of the strong evidence of defendant's guilt introduced at trial, we cannot conclude that the testimony at issue likely affected the outcome of the case. Reversal based on ineffective assistance of counsel is thus unwarranted. *Id*.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot